

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
BEACON
FOR CONSTRUCTION
OF THE
SHORELINE EROSION CONTROL DEMONSTRATION PROJECT
VENTURA COUNTY, CALIFORNIA

THIS MEMORANDUM OF AGREEMENT is entered into this ____ day of _____, 2004 by and between the Department of the Army (hereinafter referred to as the "Government"), represented by the Assistant Secretary of the Army (Civil Works) and the Beach Erosion Authority for Clean Oceans and Nourishment (hereinafter referred to as "BEACON").

WITNESSETH THAT:

WHEREAS, construction of the Project is authorized by Section 227 (e) of the Water Resources Development Act of 1996, Public Law 104-303, as amended (hereinafter "Section 227");

WHEREAS, Section 227 provides that each project shall be carried out at a privately owned site with substantial public access, or a publicly owned site, on open coast or on tidal waters;

WHEREAS, The Shoreline Erosion Control Demonstration Project for Ventura County, California, meets the selection criteria established for the Section 227 program;

WHEREAS, the Secretary of the Army has determined that the Shoreline Erosion Control Demonstration Project for Ventura County, California is feasible;

WHEREAS, Section 227 (e) of the Water Resources Development Act of 1996 provides that the cost of and responsibility for operating and maintaining the Project shall be borne by non-Federal interests;

WHEREAS, the Energy and Water Development Appropriations Act for Fiscal Year 2000, Public Law 106-60, included funds for the Government to initiate construction of the Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, provides that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element; and

WHEREAS, the Government and BEACON have the full authority and capability to perform as hereinafter set forth in accordance with the terms of this Agreement.

NOW THEREFORE, the Government and the BEACON agree as follows:

ARTICLE I - DEFINITIONS

For purposes of this Agreement:

A. The term "Project" shall mean the construction of an artificial reef in the vicinity of the former Mobil oil piers in Ventura County, along the shoreline of the Pacific Ocean generally described in the Ventura County, California, Section 227 Demonstration Project Implementation Plan, dated February 2001. (this is the date for Galveston---what's the date of our Implementation Plan?)

B. The term "period of construction" shall mean the time from the date the Government notifies the BEACON in writing, in accordance with Article XIV of this Agreement, of the scheduled date for issuance of the solicitation for the first contract for construction of the project as defined in Article I.A. or commencement, using the Government's own forces, of construction of the project to the date that the Government notifies the BEACON in writing of the Government's determination that construction of the Project is complete.

C. The term "functional portion of the Project" shall mean a portion of the Project that is suitable for tender to the BEACON to operate, maintain, repair, replace and rehabilitate in advance of completion of the entire Project. For a portion of the Project to be suitable for tender, the Government must notify the BEACON in writing of the Government's determination that, except for monitoring and adaptive management, the portion of the Project is complete and can function independently and for a useful purpose, although the balance of the Project is not complete.

D. The term "monitoring" shall mean the acquisition, analysis and distribution of data to evaluate the likely success of the Project in meeting its long-term functional performance projection and structural stability with consideration of environmental impacts and local hydrodynamic and sediment transport processes.

E. The term "adaptive management" shall mean project management actions taken to respond to data developed through the monitoring program, to be implemented if it appears that actual conditions will diverge from intended conditions to threaten the achievement of overall Project goals.

ARTICLE II - RESPONSIBILITIES OF THE GOVERNMENT

A. The Government, subject to receiving funds appropriated by the Congress of the United States and using those funds, shall construct, monitor, and adaptively manage the Project applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations and policies.

B. When the Government determines that, except for monitoring and adaptive management, the Project is complete or that a portion of the Project has become a functional portion of the Project, the Government shall notify the BEACON in writing and furnish the BEACON with an Operation,

Maintenance, Repair, Replacement and Rehabilitation Manual (hereinafter the “OMRR&R Manual”) and with copies of all of the government’s Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously. Upon such notification and through the duration of the Section 227 program, the BEACON shall operate, maintain, repair, replace and rehabilitate the entire Project or the functional portion of the Project in accordance with Articles VII of this Agreement. Further, on the date of such notice, monitoring and adaptive management shall begin for the entire Project, or functional portion of the Project, as applicable.

C. When the Government notifies the BEACON that it has been determined that the entire Project is complete or that a functional portion of the Project is complete, the monitoring and adaptive management can be initiated on the entire project, or functional portion of the project. The Government shall be responsible for monitoring and prescribing adaptive management actions for the Project. Throughout the duration of the Section 227 program, the Government may perform monitoring concurrently with the BEACON’s responsibilities for operation, maintenance, repair, replacement and rehabilitation. Throughout the duration of the Section 227 program, but no longer than 3 years, the Government may perform adaptive management concurrently with the BEACON’s responsibilities for operation, maintenance, repair, replacement and rehabilitation.

ARTICLE III - RESPONSIBILITIES OF THE BEACON

A. In accordance with Article IV. of this Agreement, the BEACON shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the BEACON must provide for the construction, operation, maintenance, repair, replacement, rehabilitation, monitoring and adaptive management of the Project, and shall perform or ensure performance of all relocations that the Government determines to be necessary for the construction, operation, maintenance, repair, replacement and rehabilitation of the Project.

B. Upon notification from the Government pursuant to Article II. B. and throughout the duration of the Section 227 program, the BEACON shall operate, maintain, repair, replace and rehabilitate the entire Project or the functional portion of the Project in accordance with Article VII of this Agreement.

C. Upon conclusion of Federal participation in the Section 227 Program, the BEACON shall remove any above ground improvements such as geo-textile tubes, fencing, and signs consistent with industry practice. The dune corridor and sand placed on the beach will remain at the end of the project.

ARTICLE IV - LANDS AND PUBLIC LAW 91-646 COMPLIANCE

A. The Government, after consultation with the BEACON, shall determine the lands, easement and rights-of-way required for the construction, operation, maintenance, repair, replacement, rehabilitation and adaptive management of the Project, including those required for relocation of public facilities and utilities, borrow materials, and dredged or excavated material

disposal. The Government in a timely manner shall provide the BEACON with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines that the BEACON must provide, in detail sufficient to enable the BEACON to fulfill its obligations under this paragraph, and shall provide the BEACON with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the end of the period of construction, the BEACON shall acquire all lands, easements, and rights-of-way set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each construction contract, the BEACON shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines that the BEACON must provide for that contract.

B. The BEACON shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 CFR Part 24, in acquiring lands, easements, and rights of way, and performing relocations for construction, operation, maintenance, repair, replacement, rehabilitation and adaptive management of the Project, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the BEACON and the Government, not later than 30 days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly during the period of construction and monitoring of the project. The Government's Project Manager and a counterpart named by the BEACON shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the BEACON counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. During the period of construction, monitoring, and adaptive management, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act for relocations; the Government's cost projections; final inspection of the entire Project or functional portions of the Project; preparation of written directions concerning operation and maintenance; anticipated requirements and needed capabilities for performance of operation and maintenance of the Project and other related matters. This oversight shall be consistent with a project management plan developed by the Government after consultation with the BEACON.

D. During the period of construction and monitoring and adaptive management and following a major storm event, the Project Coordination Team will determine the extent of repair,

rehabilitation, or replacement appropriate based on the extent of damage, project integrity, and cost. The Project Coordination Team may make recommendations that it deems warranted to the Section 227 Program Manager at the USACE Research and Development Center on matters regarding the advisability of reconstruction or maintenance.

E. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for implementation of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

ARTICLE VI - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay 50 percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VII - OPERATION AND MAINTENANCE

A. Upon notification in accordance with Article II.B. of this Agreement, the BEACON shall operate, maintain, repair, replace or rehabilitate the entire Project or a functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article IX of this Agreement and specific directions prescribed by the Government in the OMR&R Manual and any subsequent amendment thereto.

B. The BEACON hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the BEACON owns or controls for access to the Project for the purpose of inspection and monitoring, and, if necessary, for the purpose of completing, operating or maintaining the Project. If an inspection shows that the BEACON for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the BEACON. If, after 30 calendar days from receipt of notice, the BEACON continues to fail to perform, then the Government shall have the right to enter, at reasonable times, and in a reasonable manner upon property that the BEACON owns or controls for access to the Project for the purpose of completing, operating and maintaining the Project. No completion, operation or maintenance by the Government shall operate to relieve the BEACON of its obligations as set forth in this Agreement, and, if such operation and maintenance by the Government costs \$25,000 or less, the BEACON agrees to reimburse the Government's cost of such operation and maintenance. No completion, operation or maintenance by the Government shall operate to relieve the BEACON of its obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE VIII - INDEMNIFICATION

The BEACON shall hold and save the Government free from all damages arising from construction, operation, maintenance, repair, replacement, rehabilitation, monitoring, and adaptive management of the Project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE IX - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the BEACON and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 USC 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army". The BEACON is also required to comply with all applicable federal labor standards requirements including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c).

ARTICLE X - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the BEACON each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

ARTICLE XI - OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, nor resident commissioner, shall be admitted to any share or part of this Agreement or to any benefit that may arise therefrom.

ARTICLE XII - TERMINATION OR SUSPENSION

A. If at any time the BEACON fails to fulfill its obligations under this Agreement, the District Engineer shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the Project is in the interest of the United States

or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the BEACON in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the BEACON elects to terminate this Agreement, whichever occurs first.

ARTICLE XIII - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the BEACON shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the BEACON determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article IV of this Agreement, to be required for the construction, operation, and maintenance of the Project. The BEACON shall be responsible, as between the Government and the BEACON, for the costs of such investigations for hazardous substances. However, for lands that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the BEACON with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction. The costs of investigations for hazardous substances on land subject to the navigation servitude shall be borne entirely by the Government.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article IV of this Agreement, to be required for the construction, operation, maintenance, repair, replacement, rehabilitation, monitoring, and adaptive management of the Project, the BEACON and the Government shall provide prompt written notice to each other, and the BEACON shall not proceed with the acquisition of the real property interests until both parties agree that the BEACON should proceed.

C. The Government and the BEACON shall determine whether to initiate construction of the Project, or, if already in construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article IV of this Agreement, to be required for the construction, operation, and maintenance of the Project. Should the Government and the BEACON determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the BEACON shall be

responsible, as between the Government and the BEACON, for the costs of clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. In the event the BEACON fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the BEACON's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The BEACON and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary clean up and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the BEACON, the BEACON shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the BEACON shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE XIV - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

BEACON: Mr. Kevin Ready
Executive Director of BEACON, Senior Deputy County Counsel
County of Santa Barbara, Office of County Counsel
105 Anapamu Street
Suite #201
Santa Barbara, CA 93101

GOVERNMENT: Colonel Richard G. Thompson
District Engineer
Department of the Army
Los Angeles District, Corps of Engineers
915 Wilshire Blvd.
Los Angeles, CA 90017

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XV - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVI - HISTORIC PRESERVATION

A. The costs of identification, survey and evaluation of historic properties shall be borne entirely by the Government.

B. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation, also, shall be borne entirely by the Government up to the statutory limit of one percent of the total amount the Government is authorized to expend for the Project.

IN WITNESS WHEREOF, the parties hereto have executed this MOA, which shall become effective upon the last date signed below.

DEPARTMENT OF THE ARMY:

BEACON:

BY: _____
Colonel Richard G. Thompson
District Engineer
Los Angeles District, Corps of Engineers

BY: _____
Mr. Kevin Ready
Executive Director of BEACON

DATE: _____

DATE: _____

:

Need to modify this as appropriate to BEACON
CERTIFICATE OF AUTHORITY

I, _____ do hereby certify that I am the Land Commissioner of the Texas General Land Office with full authority and legal capability to perform the terms of the Memorandum of Agreement between the Department of the Army and the Texas General Land Office in connection with the construction of a Section 227 – Shoreline Erosion Control Demonstration Project Jefferson County, Texas, and to pay damages, if necessary, in the event of the failure to perform, and that the persons who have executed this Agreement on behalf of the Texas General Land Office has acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 200__.

[SIGNATURE]

[NAME]

[TITLE]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000.00 and not more than \$100,000.00 for each such failure.

[SIGNATURE OF MOA SIGNATORY]

[NAME]

[TITLE]

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